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# Supreme Court of the United States

No. 197

OCTOBER TERM, 1937

ESTABAN ADAM, *Petitioner*,
v.
WILLIAM SAENGER, ET AL., *Respondents*

## Respondent's Motion for Rehearing

OLIVER J. TODD,
*Attorney for Respondents*

*Of Counsel:*
GEO. E. HOLLAND

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MAY IT PLEASE THE COURT:

Respondents respectfully present this their motion for rehearing herein, and as ground therefor submit:

**This Honorable Court in its decision of this case failed to consider the material fact that the judgment considered was one against a nonentity. That at the time the proceeding was begun in which attempted service of process was had and in which the personal**

**judgment by default was rendered against the named defendant therein, "Beaumont Export and Import Company, a Texas Corporation," such named defendant was neither a natural person, a corporation nor a partnership.**

Plaintiff's petition, to which the trial court sustained a general demurrer, as showing no right of action in favor of the plaintiff therein named, as against the defendants therein named, shows upon its face, as a part of the action, that the plaintiff's relief asked, as against the defendants therein named, was founded upon this personal default judgment and that it was one in an action brought and prosecuted to judgment against an empty name which was neither a person, corporation nor partnership in being, but a nonentity.

Treating such a judgment and proceeding as a mere nullity upon which no legal rights could be founded, or, from which no legal rights could be acquired under the laws of Texas, California, or any other state, that court, as provided by the rules of procedure in force in Texas, sustained a general demurrer to the petition and the plaintiff refusing to amend, dismissed his suit.

This action of the trial court was founded upon the quoted text in CORPUS JURIS, Vol. 47, p. 19, sec. 24:

> "If the suit is brought in a name which is that of neither a natural person, a corporation, nor a partnership, it is a mere nullity; in such case it has been held that the whole action fails."

In the same volume of CORPUS JURIS (47) at page 66, Section 138, it is stated:

> "A party, in order to be capable of being sued must have an entity which the court can recognize, either as a natural or artificial person, or a quasi-artificial person. *The capacity to be sued exists only in persons in being.*"

Looking to the opinion of this Honorable Court in this case, nothing said therein may be disputed, treating the "Beaumont Export and Import Company" *as an entity*. But if it had been correctly there referred to, treated and regarded *as a nonentity, not a person in being*, then, what is said in the opinion would have been so qualified as to point out the fact that it was not applicable to the defendant "Beaumont Export and Import Company, a Texas Corporation" named in the judgment sued on, *because there was no such entity, corporate or otherwise*, as expressly shown to the trial court and this Court in the plaintiff's petition, to which, and because of that showing therein, the demurrer was sustained.

That being true, then, the Texas trial court, governed by the law as quoted from the text supra, being the law of Texas and not alleged or claimed to be different in California, was compelled to and correctly did hold such judgment void and as giving to the plaintiff, assignee thereof, no rights thereunder to be recognized by the courts of Texas or elsewhere.

The matters discussed are presented in respondents' brief in this court, but since this Court, in its opinion, made no reference to the status of the defendant "Beaumont Export and Import Company" *as being a non existent entity* at the time the judgment against it was rendered and the action against it was begun, in which the judgment was rendered, we feel impelled to here again consider that named defendant as one *having had* corporate existence under Texas law at a time prior to these proceedings, but which had, long before the proceeding was begun, *been legally dissolved and died*, under the law and in the state of its creation, as alleged in the petition to which demurrer was sustained, if this Honorable Court had considered this case in the light of this *correct status* of the "Beaumont Export and Import Company" as an entity, we assume it would have referred to it as having

its true status and dealt with the case in that light.

Thus treating the status of that company or "*name*" we find the law of Texas to be that the legal dissolution of a corporation "destroys its capacity to be sued at law because a judgment can no more be rendered against a dead corporation than against a dead man" (ORANGE LUMBER CO. v. TOOLE, 181 S.W. at p. 825).

There is no law in California to the contrary, and none so alleged in plaintiff's petition to change the Texas rule. Certainly it would not be necessary to more than state that under the law of both Texas and California, a judgment, obtained in a suit brought against a dead man, is a nullity.

In BROOKS v. BOSTON AND N. ST. RY. CO., 221 Mass. 277, 97 N.E. Rep. 760, it is stated by the court:

> "An action at law implies by its very terms, the existence of a person who has a right to bring the action. It is axiomatic that a corpse is not a person."

In MAURY v. TURNER, 244 S.W. 809, the Supreme Court of Texas, at the bottom of page 811 states:

> "The judgment in cause No. 4699 was not binding on any body. It was void from the beginning. The whole proceeding was without authority of law, because the suit was brought by a private person against 'the unknown owner' of the property. The petition named no one as party defendant."

But it may be contended that while this is the common law rule and although the common law is in force in both Texas and California, still, this common law rule has been modified by the statutes of those States. This we may now notice.

We take it to be settled law that the statutes of a State have no extra-territorial operation (see R.I. & P. RY. CO. v. THOMPSON, 100 Texas, at page 189). From which it follows necessarily that no statute of the State of California

can have any bearing upon a corporation created and dissolved by the laws of Texas, therefore no pleaded statute of California could have any relevancy or bearing. No statute of California could extend the life of a Texas corporation for any purpose, or give a cause of action against it, after its dissolution in Texas. Texas only could do that.

The Texas statutes are before this Court. The courts of Texas have passed upon them and the rule and decision of this Honorable Court is, as to their effect, "whatever is matter of law in the court appealed from is matter of law here."

In a suit claiming a right given by statute, the cause of action must be founded upon the statute authorizing the relief sought. Thus it is stated in SMITH v. BRIGGS-WEAVER MCH. CO., 132 S.W., at page 955, as follows:

> "It is argued that this statute created a cause of action and that the suit was brought to recover on the cause of action given by the statute. A sufficient answer to this contention is that the suit is not based on the statute and the petition does not allege a cause of action within the statute. If plaintiff desired to recover on a cause of action created by the statute it should have specifically pleaded the facts which show a cause of action under the statute."

The law of California is not alleged or shown to be different and if any judgment was to be obtained against the named defendant, a *dissolved and dead corporation,* or that would establish any rights as against its successors or property, such action would have to be brought under the particular statute, giving that right of action, whether it be a statute of Texas or California, and this was not done as is shown by the record in the California case.

Before the California court would acquire jurisdiction to enter any judgment against a corporation which had been

created and existed under the laws of Texas, and which had been legally dissolved under the laws of Texas, its jurisdiction would have to be invoked by a plea showing such legal right, and if based upon a Texas statute, such statute must be pleaded in connection with it, and such facts as would show a cause of action under it (CANADA S.R. Co. v. GEBHARD, 109 U.S., 27 L. Ed., at page 1024).

The only possible cause of action against the "Beaumont Export and Import Company, a Texas Corporation," after its legal dissolution, would be one given by the statutes of Texas, and as stated in COYNE v. SOUTHERN PAC. CO., 155 Fed., at page 684:

> "Viewed as a statutory right, it must be admitted that the state creating the right can attach to it any valid condition, so that, when the right is sought to be vindicated in another state or in a foreign country, the condition must also be applied. Hamilton v. R.R. Co., 39 Kan. 56, 18 Pac. 57; Slater v. Mexican Nat. R.R. Co., 194 U.S. 120, 24 Sup. Ct. 581, 48 L. Ed. 900; Minor's Conflict of Laws, Sec. 202. 'As the only source of this obligation is the law of the place of the act, it follows that that law determines not merely the existence of the obligation (Smith v. Condry, 1 How. (U.S.) 28, 11 L. Ed. 35), but equally determines its extent. It seems to us unjust to allow a plaintiff to come here absolutely depending on the foreign law for the foundation of his case, and yet to deny the defendant the benefit of whatever limitations on his liability that law would impose.' Slater v. Mexican Nat. R.R. Co., supra."

Under the settled rule of decision of the courts of Texas, passing upon, construing and giving effect to the existing Texas statutes, the judgment of the California court under discussion, *would be a nullity if rendered by a Texas court under a proceeding begun and prosecuted in like manner there.*

The particular statute upon which the right of action was founded, would have to be pleaded (SMITH v. BRIGGS-WEAVER, supra). The status of the named defendant as a dissolved corporation would have to be pleaded as necessary to show a cause of action. "The reasons for this averment, if there are no others, are found in its purpose, which is to fix the venue of the suit and to inform the court and its officers upon whom the service of process should be made, *as well as to show the capacity of the defendant to sue and be sued.*" (G.H. AND S.A. RY. v. SMITH, 81 Tex. 479). "The action to establish a liability of the corporation (defunct) must designate all of the surviving directors *as defendants and all of them must be cited to appear and answer the plaintiff's demand*" (WITHERSPOON v. T. & P. RY. CO., 48 Tex. 309-319; CORSICANA TRANSIT CO. v. WALTON, 189 S.W. 307; s.c., 222 S.W. 979). For the obvious reason that these directors act only "in the capacity of trustees after the dissolution are individually liable for breach of duty and their liability is that of trustees" (COMRADS v. KASCH, 26 S.W. (2d) 732).

Certainly the courts of Texas could not be required by "R. S., Sec. 905, 28 U.S.C. 687" to pronounce valid and give force to a judgment of a sister state, which was founded on a right of action (if it had foundation at all), against a defunct corporation of Texas, given only by statute of Texas, and which proceeding and judgment, if had in the Texas courts, would be a nullity there. Such is the status of the California judgment involved in this case.

We now briefly refer to the service of process on Mr. Bailey, which this Court pronounced valid. Dealing with "Beaumont Export and Import Company, a Texas Corporation" as an entity, as this Court did, we may not question anything said by the Court. But dealing with it as a *nonentity, a corpse*, as the record shows it to be, we think this Honorable Court will agree with us that the California statute quoted,

has no reference to the "attorney" of a corpse or nonentity as being "the corporation's attorney of record," and, if it did, it would be void.

Upon its dissolution it lost its identity. Its officers and directors were no longer such. Its agents and attorneys eo instanti lost all powers and connections. "The death of the principal is an instantaneous and absolute revocation of the authority of the agent" (CLEVELAND v. WILLIAMS, 29 Tex. at page 214." A power of attorney though irrevocable during the life of a party becomes extinct by his death" (HUNT v. ROUSMANIER, U.S., 5 L. Ed. 589). "The death of the *client* or in the case *of a corporation, its dissolution* vacates the power of attorney and the latter is neither required *nor authorized* to do anything further (CORPUS JURIS, Vol. 6, p. 675, Sec. 188).

These are general legal principles and the law in all of the states and it would seem unreasonable that by statute, a state could extend the agency contract beyond the death of the principal, so that, by service on this *extended* agent, obtain jurisdiction over the corpse of the dead principal. We know of no authority for such powers.

We respectfully submit that the status of the "Beaumont Export and Import Company" as being a nonentity—a corpse, when the action was begun and the personal judgment entered, as shown in plaintiff's petition against it, should be so treated, and that such judgment should be so dealt with and its validity and effect thereby measured and determined. When so regarded, we cannot escape the conclusion that the judgment is a void judgment in Texas and California alike, and the Texas courts could not, under settled decisions, principles and policies, treat it as having validity or effect. To do so would disrupt and reverse the law and policies of that state.

May we respectfully suggest that the entity or nonentity of the named defendant is the point. As to an entity, one rule

governs. As to a nonentity, or corpse, we urge the rules herein stated as governing, and respectfully ask the Court to reconsider this case and decide the same in the light of that distinction, as to it may seem proper.

Respectfully submitted,

OLIVER J. TODD,
*Attorney for Respondents*

*Of Counsel*:
GEO. E. HOLLAND

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# SUPREME COURT OF THE UNITED STATES.

No. 197.—October Term, 1937.

Estaban Adam, Petitioner, vs. William Saenger, et al. | On Writ of Certiorari to the Court of Civil Appeals for the Ninth Supreme Judicial District of the State of Texas.

[January 31, 1938.]

Mr. Justice Stone delivered the opinion of the Court.

The question for decision is whether the action, in this case, of the Texas state courts, in dismissing a suit founded upon a judgment of the supreme court of California, denied to the judgment the faith and credit which the Constitution commands.

Petitioner, as assignee of a California judgment against the Beaumont Export & Import Company, a Texas corporation, brought the present suit in the Texas state district court against respondents, directors of the corporation acting as its trustees in dissolution, and against its stockholders as transferees of corporate assets, to collect the judgment. His petition sets out in detail the circumstances attending the rendition of the California judgment and incorporates by reference a duly attested copy of the judgment roll.

It appears that the corporation brought suit in the Superior Court of California, a court of general jurisdiction, against Montes, petitioner's predecessor in interest, to recover a money judgment for goods sold and delivered. Thereupon Montes, following what is alleged to be the California practice, with leave of the court brought a cross-action against the corporation, by service of a cross-complaint upon the corporation's attorney of record in the pending suit, to recover for the conversion of chattels. Judgment in the cross-action, taken by default, was followed by dismissal of the corporation's suit and is the judgment which is the subject of the present suit. A motion to open the default and to be allowed to defend, made later on behalf of the corporation, was contested and was denied by the court, the issue being whether the complaint was in fact served on the plaintiff's attorney.

cross-

The trial court sustained a general demurrer to the complaint and gave judgment dismissing the cause, which the Court of Appeals affirmed, 101 S. W. (2d) 1046. Petition to the Texas supreme court for a writ of error was denied for want of jurisdiction. We granted certiorari, — U. S. —; cf. *Bain Peanut Co.* v. *Pinson*, 282 U. S. 499, the question being an important one of constitutional law. Our writ is properly directed to the Court of Civil Appeals, it being the highest court of the state in which a judgment could be had. *Bacon* v. *Texas*, 163 U. S. 207, 215; *Sullivan* v. *Texas*, 207 U. S. 416; *San Antonio Railway* v. *Wagner*, 241 U. S. 476; *American Railway Express Co.* v. *Levee*, 263 U. S. 19.

The Court of Civil Appeals rested its decision on a single ground, want of jurisdiction of the California court over the corporation in the cross-action in which the judgment was rendered. Construing the California statutes and decisions which the complaint set out, it concluded that they did not authorize service of the complaint in the cross-action upon the plaintiff's attorney of record. It held further that in any case as the corporation was not present within the state no jurisdiction could be acquired over it by the substituted service, and the California judgment was consequently without due process and a nullity beyond the protection of the full faith and credit clause. To review these rulings we brought the case here. Cf. *Ward* v. *Love County*, 253 U. S. 17, 25; *Indiana ex rel. Anderson* v. *Brand*, No. 256, decided this day.

By R. S. § 905, 28 U. S. C. 687, enacted under authority of the full faith and credit clause, Art. IV, § 1 of the Constitution, the duly attested record of the judgment of a state is entitled to such faith and credit in every court within the United States as it has by law or usage in the state from which it is taken. If it appears on its face to be a record of a court of general jurisdiction, such jurisdiction over the cause and the parties is to be presumed unless disproved by extrinsic evidence, or by the record itself. *Hanley* v. *Donoghue*, 116 U. S. 1; *Knowles* v. *Gas Light & Coke Co.*, 19 Wall. 58; *Settlemier* v. *Sullivan*, 97 U. S. 444. But in a suit upon the judgment of another state the jurisdiction of the court which rendered it is open to judicial inquiry, *Chicago Life Insurance Co.* v. *Cherry*, 244 U. S. 25, and when the matter of fact or law on which jurisdiction depends was not litigated in the original suit it is a matter to be adjudicated in the suit founded upon the judg-

ment. *Thompson* v. *Whitman*, 18 Wall. 457. Here the fact of the service of the complaint upon the attorney is alleged by the petitioner and admitted by the demurrer, but the court's conclusion that the California court was without jurisdiction, resting in part upon its construction of the California statutes, presents an issue not litigated in the California suit which must be determined in the present one.

Congress has not prescribed the manner in which the legal effect of the judgment and the proceedings on which it is founded in the state where rendered are to be ascertained by the courts of another state. It has left that to the applicable procedure of the courts in which they are drawn in question. Where they are in issue this Court, in the exercise of its appellate jurisdiction to review cases coming to it from state courts, takes judicial notice of the law of the several states to the same extent that such notice is taken by the court from which the appeal is taken. "Whatever is matter of law in the court appealed from is matter of law here, and whatever was matter of fact in the court appealed from is matter of fact here." *Hanley* v. *Donoghue, supra*, 6.

According to Texas law the legal effect of the judgment of another state, on which suit is brought, is to be determined by the court, not the jury. But a suitor who asserts that the force and effect of the judgment is different from that of a similar judgment of the courts of the state is required to allege specifically and prove as matter of fact the particular laws or usage on which he relies to establish the difference, and on demurrer only the law or usage specifically alleged will be considered in determining whether the law of another state differs from that of Texas. *Porcheler* v. *Bronson*, 50 Tex. 555; *Gill* v. *Everman*, 94 Tex. 209; *National Bank of Commerce* v. *Kenney*, 98 Tex. 293.

In the present suit petitioner, in conformity to the state procedure, has set out in his complaint the California statutes and the citations of the decisions of California courts which he contends establish the law of that state that a cross-action in a pending suit may be begun by service of a cross-complaint upon the plaintiff's attorney. The question thus raised upon demurrer for decision by the court is the legal effect in California of the service, and hence of the judgment founded upon it. Whether the question be regarded as one of fact or more precisely and accurately as a ques-

tion of law to be determined as are other questions of law, although procedural exigencies require it to be presented by the pleading and proof, as are issues of fact, it is one arising under the Constitution and a statute of the United States which commands that such faith and credit shall be given by every court to the California proceedings "as they have by law or usage" of that state. And since the existence of the federal right turns on the meaning and effect of the California statute, the decision of the Texas court on that point, whether of law or of fact, is reviewable here. *Stanley* v. *Schwalby,* 162 U. S. 255, 274, 277-279; *Southern Pacific R. Co.* v. *Schuyler,* 227 U. S. 601, 611; *Creswill* v. *Knights of Pythias,* 225 U. S. 246, 261; *Ancient Egyptian Order* v. *Michaux,* 279 U. S. 737, 744-746; *Norris* v. *Alabama,* 294 U. S. 587, 590; see *Northern Pacific R. Co.* v. *North Dakota,* 236 U. S. 585, 593; cf. *Union Pacific R. Co.* v. *Public Service Comm'n,* 248 U. S. 67, 69; *Ward* v. *Love County, supra,* 22; *Truax* v. *Corrigan,* 257 U. S. 312, 324; *Davis* v. *Wechsler,* 263 U. S. 22, 24; *Patterson* v. *Alabama,* 294 U. S. 600, 602.

While this Court reexamines such an issue with deference after its determination by a state court, it cannot, if the laws and Constitution of the United States are to be observed, accept as final the decision of the state tribunal as to matters alleged to give rise to the asserted federal right. This is especially the case where the decision is rested, not on local law or matters of fact of the usual type, which are peculiarly within the cognizance of the local courts, but upon the law of another state, as readily determined here as in a state court. *Huntington* v. *Attrill,* 146 U. S. 657, 684; *Yarborough* v. *Yarborough,* 168 S. C. 46, 290 U. S. 202.

In ruling that the service in the California suit was unauthorized, the Court of Civil Appeals said:

"The cross action was not an ancillary proceeding, but an independent suit in which a final judgment could be rendered without awaiting a decision in the original suit. Farrar *v.* Steensburg, 173 Cal. 94, 159 Pac. 707. It is well settled in this State that a cross action occupies the attitude of an independent suit and requires service of the cross action upon the cross defendant. Harris *v.* Schlinke, 95 Tex. 88. This being so, in the absence of a waiver of service, or an appearance by the cross defendant, personal service on the cross defendant must be had to confer jurisdiction upon the court to determine the matter and render judgment in the case."

But the question presented by the pleadings is the status of a cross-action under the California statutes, not under those of Texas. We think its status is adequately disclosed by the California statutes and decisions pleaded by petitioner, and is that for which he contends.

Section 442 of the California Code of Civil Procedure specifically provides that a defendant may secure affirmative relief upon "cross-complaint" which "must be served upon the parties affected thereby", and requires service of "summons upon the cross-complaint" only upon such parties as "have not appeared in the action."[1] Arguing that "action means only "cross-action" and not the original action brought by the plaintiff, the Texas court concluded that a plaintiff who has not appeared in the cross-action must be served with summons "as upon the commencement of an original action." But the word "action", even if susceptible of such meaning, cannot be so interpreted in the face of the pleaded California decisions which hold that a cross-complaint may be served on the attorney of one who is already a party to the original action. *Farrar* v. *Steenburgh*, 173 Cal. 94; *Wood* v. *Johnston*, 8 Cal. App. 258; *Ritter* v. *Braash*, 11 Cal. App. 258.

Section 1015 provides that in all cases where a party, whether resident or non-resident, has an attorney in an action, "the service of papers, when required, must be upon the attorney instead of the party, except service of subpoenas, of writs and other process issued in the suit, and of papers to bring him into contempt."[2] The Court of Civil Appeals construed this section as requiring "service of subpoenas, of writs, and other process issued in the suit" upon the party rather than the attorney, and as including the cross-com-

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1 "Whenever the defendant seeks affirmative relief against any party, relating to or depending upon the contract, transaction, matter, happening or accident upon which the action is brought, or affecting the property to which the action relates, he may, in addition to his answer, file at the same time, or by permission of the court subsequently, a cross-complaint. The cross-complaint must be served upon the parties affected thereby, and such parties may demur or answer thereto as to the original complaint. If any of the parties affected by the cross-complaint have not appeared in the action, a summons upon the cross-complaint must be issued and served upon them in the same manner as upon the commencement of an original action."

2 "When a plaintiff or a defendant, who has appeared, resides out of the state, and has no attorney in the action or proceeding, the service may be made on the clerk or on the justice where there is no clerk, for him. But in all cases where a party has an attorney in the action or proceeding, the service of papers, when required, must be upon the attorney instead of the party, except service of subpoenas, of writs and other process issued in the suit, and of papers to

plaint in the terms "writ" and "process". But assuming that a cross-complaint served without summons may be so characterized, it is clear that the section does not by its terms preclude valid service of the cross-complaint upon the attorney for a party which, as we have seen, § 422 permits. Section 1015 directs service upon the attorney of all but the three types of papers excepted, but says nothing as to the effectiveness of service of those papers upon him. Section 1011, set out in the pleading though not referred to in the court's opinion, reads, "Notices and papers, when and how served. The Service may be personal, by delivery to the party or attorney on whom the service is required to be made. . . ."

The question whether § 1015 does forbid service of a cross-complaint on the attorney has been definitely answered in the negative by the Supreme Court of California, which, in *Farrar* v. *Steenburgh, supra,* 97, held, "Service of a cross-complaint upon a plaintiff who appears by an attorney is not made by a summons to the plaintiff, but by delivery of a copy of the cross-complaint to the attorney." Upon this ground the California District Court of Appeals, in cases on which petitioner relies, has sustained judgments taken upon default in a cross-action begun by service of the cross-complaint on the plaintiff's attorney. *Ritter* v. *Braash, supra; Wood* v. *Johnston, supra.* Upon all the pleaded evidence of the California law, to the consideration of which we are restricted by the present state of the record, we think the only inference to be drawn is that the service in the California suit was authorized by California law.

There is nothing in the Fourteenth Amendment to prevent a state from adopting a procedure by which a judgment *in personam* may be rendered in a cross-action against a plaintiff in its courts, upon service of process or of appropriate pleading upon his attorney of record. The plaintiff having, by his voluntary act in demanding justice from the defendant, submitted himself to the jurisdiction of the court, there is nothing arbitrary or unreasonable in treating him as being there for all purposes for which jus-

bring him into contempt. If the sole attorney for a party is removed or suspended from practice, then the party has no attorney within the meaning of this section. If his sole attorney has no known office in this state, notices and papers may be served by leaving a copy thereof with the clerk of the court or with the justice where there is no clerk, unless such attorney shall have filed in the cause an address of a place at which notices and papers may be served on him, in which event they may be served at such place."

tice to the defendant requires his presence. It is the price which the state may exact as the condition of opening its courts to the plaintiff. *Young Company* v. *McNeal-Edwards Co.*, 283 U. S. 398, 400; compare *Chicago & Northwestern Railway Co.* v. *Lindell*, 281 U. S. 14, 17.

The judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

*Reversed.*

Mr. Justice CARDOZO took no part in the consideration or decision of this case.

Mr. Justice BLACK concurs in the result.

A true copy.

Test:

*Clerk, Supreme Court, U. S.*